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No. 93-693

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CITY OF BAYONNE,

Petitioner,

vs.

TOWN OF SECAUCUS, HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP OF WEEHAWKEN and TOWN OF WEST NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT TOWN OF SECAUCUS

FRANCES C. HOLLAND
Counsel of Record and
On the Brief
HOLLAND & HOLLAND
Attorneys for Respondent
Town of Secaucus
103 Barringer Court
West Orange, New Jersey 07052
(201) 325-0400

4388
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTIONS PRESENTED

1. Under settled law, may a municipality rely upon the Fourteenth Amendment to the United States Constitution in an action against the State that created it?

2. Has the Petitioner demonstrated legally sufficient Supreme Court review jurisdiction or has it improperly attempted to "supplement" the record below so as to artificially create and concoct the appearance of federal jurisdiction?

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STATEMENT OF THE CASE

The petition for writ of certiorari filed by the City of Bayonne with the United States Supreme Court seeks this Court's exercise of review jurisdiction and seeks to invoke the protection to the City of Bayonne of the Fourteenth Amendment to the Constitution of the United States by alleging purported denials to the municipality of due process and equal protection rights resulting from the August 4, 1993 New Jersey Supreme Court judgment in a state case. Settled principles of law establish that a municipality cannot invoke Fourteenth Amendment protection in an action against the State that is its creator. *Williams v. Mayor of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933). The New Jersey Supreme Court is the highest court of the judicial branch of the State government. The City of Bayonne is a political subdivision of the State of New Jersey located in the County of Hudson. Respondent, Town of Secaucus, and the Petitioner, City of Bayonne, are two of the twelve constituent municipalities of Hudson County. Ten of the other respondents are Hudson County municipalities which are to be financially recompensed for their past county tax overpayments, as is Secaucus, under the terms of the recent New Jersey Supreme Court judgment; Bayonne is required to satisfy its prior underpayments of past years' county taxes.

The petitioner, Bayonne's "Statement of Jurisdiction" states inaccurately that this Court has jurisdiction, pursuant to 28 U.S.C. § 1257(a), to review these exclusively state issues of this case within the judgment of the Supreme Court of New Jersey. Further, the petitioner's "Statement of the Case" and "Questions Presented" misstate relevant facts, expanding and inaccurately shading the facts of the state court record in an unsuccessful attempt to generate a colorable "factual" predicate for federal jurisdiction and grant of certiorari for review of the state court judgment. Petitioner's ostensible history dealing with "reliance" by Bayonne was also not part of the state court record.

The New Jersey Supreme Court affirmed both the judgment of the Appellate Division of the Superior Court of New Jersey and the trial court judgment of the Superior Court, Law Division, finding N.J. Stat. Ann. ("N.J.S.A.") 18A:54-37 to be constitutionally invalid under the New Jersey Constitution (1947) and finding implementation by the Hudson County Board of Taxation ("HCBT") to be unauthorized by the state statute and discriminatory to the "non-Bayonne" Hudson County municipalities. The subject state statute codified as N.J.S.A. 18A:54-37 and now stricken by the New Jersey Supreme Court had been enacted by the New Jersey State Legislature in 1973 to provide the City of Bayonne with an exemption from county taxes that fund the costs of the Hudson County Vocational School. Two different county tax rates were created by HCBT in order to implement the exemption, the lower rate for Bayonne exempting it from the HCVS portion of county taxes and the higher rate for the "non-Bayonne" municipalities including the HCVS portion of the county budget. But, HCBT had also applied the higher tier county tax rate created to implement county taxes including costs of HCVS to the added and omitted assessment property rolls of the "non-Bayonne" municipalities each year long after the HCVS had been funded, producing the "non-Bayonne" municipalities' excess tax payments from the higher rate and causing their deposit into the county surplus for use in the following year in application to general county costs other than of HCVS. This HCBT methodology thereby improperly exempted Bayonne from payment of county taxes for other portions of the next year's general county budget, affording Bayonne an additional exemption from county taxes not authorized by the state statute or by other state law.

The only questions in the state proceedings were issues of New Jersey state law involving challenges under the New Jersey Constitution as special tax legislation and as violation of the tax uniformity clause by the subject state statute, which exclusively

exempted the petitioner-municipality from a part of county taxation funding the HCVS portion of the general county budget, and a related challenge also under State law to the improper administrative calculation and implementation of county tax apportionment by the HCBT, improperly exempting the petitioner-municipality from payment of county taxes for aspects of the county budget other than for HCVS, in a manner not authorized by the subject statute.

No federal questions were pressed, passed upon or in any way involved in this state case. The New Jersey Supreme Court decision in this case is based purely upon state grounds: (i) that the challenged exemption statute was unconstitutional special legislation pertaining to taxation, or exemption, barred by the prohibition on special tax legislation found at article IV, § 7, ¶ 9 of the 1947 New Jersey Constitution; and (ii) that the HCBT's implementation of the stricken statute to county tax allocation was discriminatory in its application to all the "non-Bayonne" municipalities of Hudson County. The thirty-four page trial court decision (Ra1) and the Appellate Division opinion, reported as *Secaucus v. Hudson County*, 255 N.J. Super. 665, 605 A.2d 1151 (N.J. Super. Ct. App. Div. 1992), also rest purely upon questions of state law. No issues of federal law were pressed or proffered by the City of Bayonne, or by any other party, either explicitly or "implicitly" at any stage of the state proceedings.

A. N.J.S.A. 18A:54-11, The State Statute.

Since the 1930's Bayonne maintained a vocational education program, initially in a separate vocational high school, but by the 1960's fully integrated within Bayonne's comprehensive high school. There was no "vocational education" student per se. Students in Bayonne's vocational program fully participated in high school activities with other students, and attended many classes with other non-vocational education students.

The subject state statute originally introduced in the New Jersey State Senate by Senator Dugan in the 1972 Legislative Session, as Senate Bill No. 74, when subsequently enacted, provided as follows:

> 1. Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes *in any county of the first class having a population of not more than 700,000* according to the 1970 Federal Census, each municipality included within a school district [maintaining a system of] *which has maintained for a minimum of 20 years* a vocational education *program* approved for the purposes of Federal and State allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

1973 N.J. Laws, c. 305, §1.

From the time of this statute's enactment of all the State's municipalities *only* Bayonne qualified for exemption. The New Jersey Supreme Court found that the original proposed legislation before amendment in the Senate Education Committee ". . . would have exempted virtually every municipality with a vocational education program from contributing to the support of its county vocational school." *Town of Secaucus v. Hudson County Board of Taxation,* 133 N.J. 482, at 487, 614 A.2d 616 (N.J. 1992) (Pa3).

The committee amendment narrowed the terms of the original Bill from *all municipalities* with a "system of vocational

education" limiting its application *to only* those municipalities in a county of the first class having a population of under 700,000, and maintaining a program for a minimum of 20 years. The Senate Education Committee Statement to the Bill left no doubt as to the legislative intent:

> This bill, as amended, would exempt the city of Bayonne from any assessment of taxes due to the cost of supporting the county vocational school in Hudson County.

The legislative history of the subject statute shows that as originally proposed, the exemption would have applied to any municipality within a school district maintaining a system of vocational education approved for federal or state funding. Thus the original general object was to provide relief for any (and all) of those New Jersey municipalities operating their own vocational education systems or programs, or included within districts approved for aid purposes, from the hardship of simultaneous support of a county vocational school. The trial court found that virtually every municipality in the state receives some federal funds from vocational education. (Ra13). The New Jersey Supreme Court Opinion found that "[a]t least twenty municipalities within the state maintained their own vocational-education program . . .," *Id.* 133 N.J. 482, at 495 (Pa13). Upon committee amendment substantially restricting its scope by aggregate, multiple limitations, and subsequent enactment of the special state statute, however, only Bayonne became exempt, because of all the state's municipalities, only Bayonne was located in a county of the first class having a population less than 700,000 (Hudson County) *and* had maintained a vocational educational program approved for aid for the requisite 20 years. The restricted state statute as thus enacted provided by its aggregate, multiple limiting classifications that there be no apportionment of county tax to Bayonne for amounts in the general county budget for the use of the county vocational school district.

The New Jersey Supreme Court Opinion, after engaging in a well-reasoned and detailed special legislation constitutional analysis of the statute's purpose and application of that purpose to the specific facts of the case, concluded that the statute as it actually operates does not represent a reasonable legislative classification and, therefore, violates the prohibition on special legislation of art. IV, § 7, ¶ 9, of the New Jersey Constitution. *Id.* 133 N.J. 482, at 501 (Pa20).

B. The State Proceedings.

On October 17, 1986 Secaucus, a Hudson County municipality, instituted an action in lieu of prerogative writs in the Superior Court of New Jersey, Law Division: (i) against the defendants, Hudson County Board of Taxation ("HCBT") and Hudson County, alleging overpayments of county taxes in past years, seeking declaratory and prerogative writ relief requiring exclusion of the higher two-tiered county tax rate apportioning vocational school costs from the Secaucus rate of tax payment to the county on account of added and omitted assessment property lists after full funding each year for the County Vocational school and (ii) against Hudson County for damages to the extent of plaintiff's past overpayments of county taxes, for the years 1981 through 1986, resulting from HCBT's erroneous use of the two-tiered rate applicable to the funding of the vocational school for HCBT's calculations of Secaucus' county tax payments on account of added and omitted assessments. Plaintiff sought summary disposition in respect to the declaratory and prerogative writ relief. Secaucus served notice upon Bayonne and all the other Hudson County municipalities with copies of the Complaint, upon filing with the Superior Court, Law Division. *None* of the Hudson County municipalities intervened in the action, despite the notice provided by Secaucus.

On March 5, 1987, the trial court determined that the

combined two tier rate created by HCBT for the "non-Bayonne" municipalities, in order to exempt Bayonne from apportionment of county taxes appropriated for the Hudson County Vocational School ("HCVS"), when applied by the HCBT to added and omitted assessment property rolls of the "non-Bayonne" municipalities after funding had been raised for the county vocational school resulted in undue discrimination to all Hudson County municipalities other than Bayonne due to the methodology whereby the funds were received by the County into surplus for general county purposes. The remedy for this discrimination adopted in 1987 by the trial court was the segregation by the County in escrow of the "non-Bayonne" municipalities' vocational school higher tier county tax rate component from added and omitted taxes to be used for county vocational school costs in the ensuing year. Secaucus' claim against the County for past damages was withdrawn and dismissed by the trial court without prejudice; judgment was entered on April 16, 1987, but stayed pending appeal. Cross-appeals on the issue of remedy were then filed (Docket No. A-4854-86T8). During the appeal, it became apparent to Secaucus that the subject state statute did not pass muster under the New Jersey Constitution. The Appellate Division, in an unpublished Opinion dated May 16, 1988, reversed on the issue of remedy, and remanded the matter to the Law Division for further proceedings on the remedy on the grounds that all of the other Hudson County municipalities, although given notice of the action and served by Secaucus with the October 16, 1986 Complaint, were not joined as parties, and because Secaucus had raised substantial constitutional questions arising under the New Jersey Constitution on appeal requiring the trial court's initial determination. *See* 1988 Appellate Division Slip Op. (Ra9).

Pursuant to the Appellate Division's 1988 remand and the leave granted to Secaucus by the trial court to amend its Complaint, Secaucus filed its Second Amended Complaint in Lieu of Prerogative Writs contending the constitutional invalidity of

N.J.S.A. 18A:54-37, both by violation of the special tax legislation prohibition of art. IV, § 7, ¶ 9 and of the tax uniformity requirement of art. VIII, § 1, ¶ 1 of the New Jersey Constitution (1947), in addition to the matters set forth in the earlier Complaint. The Second Amended Complaint named Bayonne and all of the other "non-Bayonne" Hudson County municipalities as parties defendant.

On June 29, 1990, the trial court issued a 34-page written opinion finding that N.J.S.A. 18A:54-37 violated both the special legislation prohibition and the uniformity requirement of the New Jersey Constitution (1947), and finding the higher tier tax rate as applied by HCBT to the added and omitted tax rolls of the "non-Bayonne" municipalities to be improper and discriminatory and beyond the scope of the statute. (Ra1-34). The August 9, 1990 trial court judgment granted *partial relief only for the period from 1986 to May 1988* from HCBT's improper implementation of the statute which resulted in overpayments of county taxes by the "non-Bayonne" municipalities on their added and omitted assessments, mandating credits on subsequent county taxes to be provided to the "non-Bayonne" municipalities in compensation for prior overpayments of county taxes and debits to Bayonne in restitution for prior underpayments of county taxes resulting from the implementation by HCBT.

Full relief from the application of the unconstitutional statute was granted by the 1990 trial court judgment: (i) by full elimination of the two-tiered county tax rates commencing with those 1988 and 1989 county tax rates determined subsequent to the May 27, 1988 filing of Secaucus' motion to amend the Complaint alleging unconstitutionality, with adjustments of past overpayments of county taxes by credits to the non-exempted, "non-Bayonne" municipalities on subsequent county taxes and of past underpayments by debits to Bayonne on subsequent county taxes and also (ii) by HCBT's required implementation in the 1990

Abstract of Ratables of a single county tax rate and thereafter (for the subsequent general county budget cost apportionment) among all Hudson County municipalities. Finally, the trial court required all credits to the "non-Bayonne" municipalities and debits to Bayonne on subsequent county taxes resulting from all aspects of remedies granted by the trial court to be implemented by HCBT in the 1990 Hudson County Abstract of Ratables. At the conclusion of a full hearing on settlement of the order on August 9, 1990, the trial court entered the Order implementing its Opinion granting summary judgment.

Bayonne filed a Notice of Appeal and moved for emergent stay pending appeal, granted by the Appellate Division on August 20, 1990. Secaucus moved before the New Jersey Supreme Court for dissolution, or partial dissolution of stay. On August 31, 1990, the New Jersey Supreme Court vacated the stay for the part of the judgment requiring HCBT in the 1990 County Tax Abstract to apportion subsequent county taxes according to a single county rate among all municipalities, but *pending appeal only* continued stay of HCBT's implementation of credits and debits on county taxes to the municipalities: (i) for prior years' payment under the two county rates pursuant to the stricken exemption statute from May 27, 1988 through the 1989 tax year; and (2) for HCBT's improper and discriminatory application of the higher county tax rate to the added and omitted assessments of the "non-Bayonne" municipalities from 1986 to May 27, 1988 beyond the scope of the statute. HCBT filed a notice of appeal and Hudson County filed a cross- appeal, but on January 17, 1991, the Appellate Division entered an Order withdrawing the County's cross-appeal with prejudice.

On April 21, 1992, the Appellate Division filed its Opinion affirming the trial court. *Town of Secaucus v. Hudson County Board of Taxation*, 255 N.J. Super. 665, 605 A.2d 1151 (N.J. Super. Ct. App. Div. 1992) (Pa43). The Appellate Division's final

judgment held that the stricken statute violated the tax uniformity clause of the 1947 New Jersey Constitution and that the violation arose from the absence of uniformity in the distribution of the county tax burden due to the application of two county tax rates.

The Appellate Division Opinion reasoned that:

> [t]he overriding consideration in this appeal is that because of the constitutional mandate that there be a uniform county tax rate the Legislature may not excuse a municipality from paying county taxes that fund a county facility even though the facility is not used by its citizens - just as the legislature may not excuse an individual taxpayer from paying local taxes to fund a public school district even though the public school is not used by the taxpayer's children.

(Pa48).

The Appellate Division did not reach the question of the Law Division's ruling that the statute constituted special legislation. In May 1992, HCBT and Bayonne filed petitions for certification and notices of appeal as of right with the New Jersey Supreme Court. The Supreme Court of New Jersey granted certification, 130 N.J. 393, 396, 614 A.2d 616 (N.J. 1992) (Pa40). On August 4, 1993, the Supreme Court of New Jersey found the subject statute to be unconstitutional as special legislation prohibited by art. IV, § 7, ¶ 9 of the New Jersey Constitution (1947). Having found the statute to be unconstitutional as special tax legislation, the Supreme Court of New Jersey found it unnecessary to reach the issue of whether the statute also violated the tax uniformity clause of art. VIII, § 1, ¶ 1(a). The Supreme Court of New Jersey also affirmed the Appellate Division judgment and 1990 Law Division judgment as follows:

> Accordingly, we affirm the judgment of the Appellate Division that HCBT should debit Bayonne and credit the remaining Hudson County municipalities the appropriate added and omitted assessments for the period from 1986 to May 27, 1988, and for the 1989 tax year. To ease the burden on Bayonne, we modify the Appellate Division decision to direct HCBT to calculate the appropriate debits and credits and implement them on a pro-rated basis over a reasonable period of time. We further affirm the elimination of the two-tiered Hudson County tax rate that was ordered in 1990.

(Pa29).

Subsequently, on August 13, 1993, HCBT took official action establishing a four-year period commencing in 1993 for implementation of the credit and debit remedies within subsequent county tax apportionments required pursuant to the New Jersey Supreme Court Opinion. On September 22, 1993, the New Jersey Supreme Court denied Bayonne's application for stay pending the filing of Bayonne's petition to the United States Supreme Court for writ of certiorari. On October 7, 1993, the Honorable David H. Souter, Associate Justice of the United States Supreme Court, denied Bayonne's petition for stay.

As to the aspect of remedy imposed as a result of the Constitutional invalidity of the statute, even upon completion of HCBT remedial implementation four years after 1993, of the New Jersey Supreme Court's judgment, including the satisfaction of remedial "single rate" county tax repayments from Bayonne (for underpayments in the period from May 1988) by debits, Bayonne will still retain the financial benefit from all past HCVS

exemptions from county taxes under the stricken state statute for the period from enactment in 1973 to 1988, a 15-year period, under the terms of the now-stricken exemption statute. Bayonne had also gained a delay of two years by state court stays pending appeal before making any of the county tax repayments initially ordered by the Court in 1990, plus a four-year pro-rated period of debit apportionment of the county tax repayments recently granted by HCBT, pursuant to the New Jersey Supreme Court judgment.

REASONS FOR DENYING THE WRIT

In urging the Court to grant certiorari, the petitioner municipality asserts privileges and immunities under the Fourteenth Amendment to the United States Constitution against the highest court of the judiciary branch of the State that created it, despite the complete absence of any legal authority in support of this position. Indeed, to the contrary result, it is accepted under settled principles of law, that a municipality cannot invoke the protection of the Fourteenth Amendment to the United States Constitution in an action against the State that is its creator. *Williams v. Mayor of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015, (1933), *Paramus v. Bergen County*, 2 N.J. Tax 515 (N.J. Tax Ct. 1981). Counties are similarly barred from invoking the protection of the federal Constitution or the state Constitution against the State, *Clark v. Degnan*, 83 N.J. 393, 416 A.2d 816 (N.J. 1980); *Camden v. Byrne*, 82 N.J. 133, 157, 411 A.2d 462 (N.J. 1980), *Bergen Cty. Sewer Auth. v. Little Ferry*, 7 N.J. Super. 213, 222-223, 72 A.2d 886 (N.J. Super. Ct. App. Div. 1950).

The courts have also consistently found on a related issue that both municipalities and counties having been created by the State are subject to its control. *Williams v. Mayor and Council of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933); *Trenton v. New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923); *Mobile County v. Kimball*, 102 U.S. 691, 26 L. Ed. 238 (1881); *McKenney v. Byrne*, 82 N.J. 304 (N.J. 1980).

Municipalities do possess the right to attack a statute as being in violation of the New Jersey Constitution, the theory being that an unconstitutional enactment is invalid and also that as to statutes requiring public fund expenditure, the municipality is a fiduciary and trustee of the public interest in expenditure of public funds. *Kenney v. East Brunswick Tp.*, 172 N.J. Super. 45, 49-50 (N.J. Super. Ct. App. Div. 1980). This was the basis of Secaucus' claims in the State case as presented in its Amended Complaint. It is absolutely clear, however, that municipalities do *not* possess Fourteenth Amendment rights arising under the federal Constitution.

Neither can the municipality assert the federal constitutional rights of its taxpayers and citizens, where none have intervened in the state case. Nor could the municipality have maintained such an action under the New Jersey Constitution. As the court held in *Glassboro v. Byrne*, 141 N.J. Super. 19, 23, 357 A.2d. 65 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 71 N.J. 518, 366 A.2d 674 (N.J. 1976), equal protection considerations are not available or pertinent to municipal corporations.

The petitioner's jurisdictional statement inaccurately contends, without providing any specificity in support of its statement, that jurisdiction of this Court to review the state court judgment lies in 28 U.S.C. §1257. This contention is not supported either in the petition, or in the record of the state court action, which devolved entirely upon issues of state law. No federal questions were presented below by any party, nor did any federal questions pertain to the case. Attempting to buttress its ill-founded contentions, petitioner inaccurately claims (at Pb 8) that in defending the state case it argued "*implicitly*, that if the Act was stricken, the rights safeguarded to the residents of Bayonne. . . would be impermissibly infringed . . . ." (emphasis added).

The gravamen of Bayonne's Petition is that its very active

participation in five years of New Jersey state court proceedings, commencing in 1988 in the trial court and concluding in 1993 with the New Jersey Supreme Court Judgment, allowed it insufficient process — notice and opportunity to be heard — to provide an adequate basis upon which the New Jersey courts could in fairness premise a determination that due to HCBT's improper administration (and also due to the unconstitutional exemption statute) Bayonne had improperly underpaid past county taxes, resulting in county tax overpayments by the other municipalities of the County. In an argument never raised in the state court action in the petition, Bayonne now also urges belatedly to this Court that the municipality possessed a "reliance" interest in the stricken county tax exemption granted by the state statute, somehow worthy of federal constitutional protection under the Fourteenth Amendment, or analogous to a "vested right", but unrecognized or unprotected by the New Jersey Supreme Court. Bayonne also alleges incorrectly that the well-reasoned analysis and fully supported determinations of state law affirmed within the New Jersey Supreme Court Judgment were arbitrary in their application to the municipality.

The existence of a federal question is an absolute requirement for United States Supreme Court exercise of appellate jurisdiction reviewing the decision of a state court. 28 U.S.C.A. § 1257. *Pelliconi v. Schuyler Packing Co.*, 140 N.J. Super. 190, 356 A.2d 4 (N.J. Super. Ct. App. Div. 1976). *See, e.g., Henry v. Mississippi,* 379 U.S. 443, 85 S. Ct.564, 13 L. Ed. 2d 408 (1965); *Martin v. Hunter's Lesee;* 1 Wheat. 304, 4 L. Ed. 97 (U.S. 1816); 28 U.S.C.A. § 1257; Hart & Wechsler, *The Federal Courts and the Federal System* (2d ed. 1973) at 470-526. Thus, under our federal governmental system, the federal courts have no jurisdiction to review a state court judgment except when a federal question has been presented. Only in such a case presenting a federal question may the final decree or judgment of the highest state court in which a ruling might be had may there be review on certiorari in the

Supreme Court of the United States. *Reich v. City of Freeport*, 388 F. Supp. 953, (D.C. Ill. 1974), *aff'd*, 527 F.2d 666 (7th Cir. 1975). The Supreme Court of the United States possesses no inherent corrective power of review over state courts as it holds to supervise and review proceedings in federal courts. *Hoag v. State of N.J.*, 356 U.S. 464, 78 S. Ct. 829, 2 L. Ed. 913, *rehearing denied*, 357 U.S. 933, 78 S. Ct. 1366, 2 L. Ed. 2d 1375.

Even in those cases where there are errors in federal law application in state court judgments, the United States Supreme Court will not review if the state court judgment rests on independent and adequate state grounds. 28 U.S.C.A. § 1257(a). *Super Tire Engineering Co. v. McCorkle*, 550 F.2d, 903, (3rd Cir. 1977), *cert. denied*, 98 S. Ct. 16, 434 U.S. 827, 54 L. Ed. 2d 86, *rehearing denied*, 98 S. Ct. 753, 434 U.S. 1025, 54 L. Ed. 2d 773.

There are clearly no questions of federal law in this case. In the state court action, Bayonne did not assert any argument arising from the United States Constitution. The state court action was determined exclusively by state law. [Yet, Bayonne, a New Jersey municipality, has now filed a petition for writ of certiorari which claims that the New Jersey Supreme Court has denied Bayonne's alleged rights of equal protection and of substantive due process pursuant to the Fourteenth Amendment of the United States Constitution.]

In the petitioners' question 1 of "Questions Presented" in its Jurisdictional Statement, the petitioner juxtaposes various factual inaccuracies to convince this Court by these inaccuracies that HCBT and Hudson County were "sham defendants" (Pb12), that it had been treated unfairly and had been denied proper legal process by the New Jersey Supreme Court. Petitioner inaccurately claims that the plaintiffs' Prerogative Writ procedure seeking mandamus against HCBT and Hudson County was a "sham" designed to maximize Bayonne's potential liability. The procedural history and facts of the state case reveal that this is absolutely untrue.

Further, the only basis upon which Bayonne was found financially responsible in 1990 by the trial court was because it had previously, significantly underpaid its proper proportionate share of county taxes and these repayments of county tax by Bayonne are the basis of the trial court judgment providing restitutionary credits to Secaucus and the other "non-Bayonne" Hudson County municipalities for their resultant past overpayments of proportionate shares of county taxes. Thus, pursuant to N.J.S.A. 54:4-49 providing for obligatorreadjustment by debits and credits for underpayment or overpayment of tax, Bayonne was obliged by the Courts to satisfy its prior underpayments of county tax. As found by the New Jersey Courts in *Roseland v. Essex County Board of Taxation*, 18 N.J. Misc. 613, 15 A.2d 765 (St. Bd. Tax App. 1940), this statutory provision, N.J.S.A. 54:4-49, does not impose any limitations period for the correction of apportionments of county and state taxes to the municipalities.

Bayonne's first faulty contention is that the New Jersey Supreme Court denied the City's alleged substantive (and procedural) due process rights. Ignoring the clear mandate of N.J.S.A. 54:4-49, Bayonne also inaccurately claims that the State Court judgment requiring the municipality to make restitutionary payments of county taxes to satisfy its prior county tax underpayments arising from the improper county tax benefit it gained through HCBT's improper methodology of apportioning added and omitted assessment county taxes and also its county tax underpayments from the post-1988 exemption statute applications, to provide recompense to the "non-Bayonne" Hudson municipalities for their resulting overpayments of county taxes, imposes improper "retroactive" "damages". Bayonne also claims without basis that through its reliance on the statutory exemption and upon HCBT's improper administrative method granting Bayonne the extra exemption on county tax outside the statutory scope, the municipality has purportedly acquired some further unspecified (property) rights permitting it to retain the

improper benefits from prior underpayments of county taxes and entitling it to continue ongoing to receive county tax exemption relief from the HCVS portion of county taxes pursuant to the terms of the now-invalidated exemption statute.

When the 1988 Appellate Division Opinion reversed and remanded for further proceedings by the trial court, and upon remand Bayonne was a party defendant. *Thus Bayonne participated fully in all state court proceedings in which its interests were determined by the state courts.*

In New Jersey, orders to accomplish proper apportionment and equality of taxation between constituent municipalities of the same county are enforceable by *mandamus. Middlesex County Bd. of Taxation v. Borough of Sayreville,* 133 N.J. Super. 41, 335 A.2d 73 (N.J. Super. Ct. App. Div. 1975). This is true when the order is directed to the county board of taxation, upon whom the primary duty for securing a fair allocation among the constituent municipalities of the common county tax burden under the state's statutory scheme for local taxation of real property. *Borough of Sayreville v. Middlesex County Bd. of Taxation,* 133 N.J. Super. 46, 335 A.2d 75 (N.J. Super. Ct. App. Div. 1975). State law requires that "the fiscal burden of county government shall be apportioned equally and impartially among the several municipalities." *Clifton v. Passaic County Bd. of Taxation,* 28 N.J. 411, 418 A.2d 1 (N.J. 1958).

The mandamus remedy was sought by Secaucus in the original state case, in conjunction with a judgment on certiorari to review and invalidate improper governmental acts, in order to compel the public officials of the county tax board and the county to properly apportion, collect and apply county taxes in conformity with the law. The focus of the initial action in lieu of prerogative writs by Secaucus was to rectify and correct improper imposition, calculation and collection of county taxes by HCBT on added and

omitted assessments and improper applications by the County of the excess public funds resulting in Secaucus' overpayments of county tax. Subsequent to the 1988 remand by the Appellate Division, Bayonne participated in all court proceedings as a defendant in the case before any of the issues of remedy in the case were determined by the trial court and thereafter Bayonne participated as an appellant through two levels of state appellate review including in the state's highest court.

Despite the fact that this state case presents no statute of limitations defense or question applicable, Petitioner's Brief nonetheless argues that the "relation back" concept, limiting amendment of pleadings in a statutorily time-barred action, should be applied by this Court to a state certiorari and mandamus action reviewing validity of governmental acts and compelling compliance of public officers of state entities with statutory obligations barring unfair allocation of county taxes and improper application of public funds. Invalid governmental acts beyond the scope of legal authority do not become validated merely by the passage of time. As stated *infra*, in New Jersey when apportionment of county and state taxes has been incorrectly accomplished, N.J.S.A. 54:4-49 requires the corrective reallocation of county and state taxes to the municipalities.

"Relation back" and similar limitation of action defenses and concepts cited by petitioner can only arise in cases from express legislative intent inherent to public purpose in enactment of applicable statutes of limitation. A statute of limitation is a legislative mandate by statute effectively limiting both the jurisdiction of the court to adjudicate certain claims or causes of action and also thereby limiting the rights of litigants to maintain litigation of particular causes of action in support of these claims. In the case of *Fischer v. Twp. of Bedminster*, 5 N.J. 534, 76 A.2d 673 (N.J. 1950), the New Jersey Supreme Court held that a legislative statute of limitations attempting to limit jurisdiction of

the New Jersey Court in actions in lieu of prerogative writs was unconstitutional and expressly barred by art. VI, § 5, ¶ 4, of the New Jersey Constitution (1947), which provides as follows:

> Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, *on terms and in the manner provided by rules of the Supreme Court*, as of right, except in criminal causes where such review shall be discretionary.

(Emphasis added).

The court in *Fischer* found that this New Jersey constitutional provision intended that actions in lieu of prerogative writs in the State be regulated solely by New Jersey Supreme Court rule without any legislative interference. *Fischer, Id.* 5 N.J. at 539. Petitioner freely admits in its petition at (Pb13) that there is no statute of limitations question in this case, but, nonetheless, argues irrelevantly that limitation of action principles unrelated to prerogative writ relief and without any existing state limitations statute nonetheless should have been applied by the State court and now should be applied by this Court.

Petitioner in its second "Question Presented", in support of its jurisdictional statement, attempts to create a purported issue from other New Jersey statutes permitting optional county service programs, such as county library services or county health services, where municipalities may choose as an alternative to provide their own local services. In the state court action, Bayonne claimed those other optional statutory programs demonstrated the generality of N.J.S.A. 18A:54-37.

The New Jersey Supreme Court in finding the statute N.J.S.A. 18A:54-37 unconstitutional special legislation, because it

unreasonably limited the scope of application to municipalities operating local vocational programs by the aggregate limiting classifications of longevity of local program, total county population and county population density, noted that this statute was readily distinguishable from statutes (of general application) permitting optional county services programs, as an alternative to local provision of service. The Court citing in support of its decision in *Vreeland v. Byrne*, 72 N.J. 292 at 301, 370 A.2d 825 (N.J. 1977), concluded on this point by emphasizing that in each case the test of generality is whether the statute "rests upon a reasonable or rational basis relevant to the purpose and object" of the enactment. *Secaucus v. Hudson County Board of Taxation*, 130 N.J. 393, 502, 614 A.2d 616 (N.J. 1993) (Pa22).

In its Jurisdictional Statement, the petitioner municipality alleges that the New Jersey Supreme Court judgment distinguishes these other statutory schemes.

In its second "Question Presented" "Jurisdictional Statement", petitioner Bayonne alleges to this Court that the New Jersey Supreme Court judgment distinguishing these other New Jersey "opt-out" statutory schemes, while striking down as a special act the exemption pursuant to N.J.S.A. 18A:54-37 has denied its citizens equal protection under the law.

Not only does the petitioner misstate the predicate facts and legal conclusions within this question presented, but as previously discussed, *infra*, the decision of the state court in this case devolved purely on issues of state law thereby presenting no federal question, but the petitioner as previously discussed, *infra*, lacks standing to raise the Fourteenth Amendment claims to this Court on behalf of its citizens.

By virtue of the similarity of analysis under New Jersey state law for evaluating general legislation and under federal equal

protection analysis to evaluate whether equal protection under the law has been afforded by the State as whether there is a reasonable basis on the classification or distinction in treatment, the New Jersey Supreme Court has already found the classification in the stricken statute to be arbitrary. So even if assuming *arguendo:* (i) that the Fourteenth Amendment were to be applied to municipalities in actions against the State; (ii) that the municipality were to have standing to raise the federal constitutional rights of its citizens; and (iii) that the state court action were to have been determined on other than state law, the multiple classifications by the stricken statute still were clearly not rationally related to its purpose. That after all was the substance of the New Jersey Supreme Court judgment. When applicable, the Fourteenth Amendment does not bar or invalidate all classifications if a legislative enactment does not regulate a semi-suspect or suspect class, the Fourteenth Amendment only prohibits invidious discrimination, against persons and classes of persons without rational basis as violations of equal protection and due process. *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, *rehearing denied,* 398 U.S. 914, 90 S. Ct. 1684, 26 L. Ed. 2d 80 (1970); *Graham v. Richardson,* 403 U.S. 315, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1974); *Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), *rehearing denied,* 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed. 2d 574 (1977).

The due process clause of the Fourteenth Amendment cannot be invoked merely because the fairness of a legal conclusion is contested. *State v. Brown,* 41 N.J. 590 198 A.2d 446, (N.J. 1964), *cert. denied* ,377 U.S. 981, 84 S. Ct. 1888, 12 L. Ed. 2d 749; *State v. Garvin,* 44 N.J. 268, 208 A.2d 402, (N.J. 1965). The due process protections required by the Fourteenth Amendment comport with basic notions of fair treatment, substantial justice, and a determination of the controversy premised on the merits. *Murphy v. Helena Rubenstein Co.,* 234 F. Supp. 893, (D.C. N.J. 1964), *appeal dismissed,* 355 F.2d 533 (3rd Cir. 1964). Irrespective of

current claims under the federal Constitution, the record of the state case confirms absolutely that the petitioner was afforded fundamental fairness by the New Jersey courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCES C. HOLLAND
HOLLAND & HOLLAND
Attorneys for Respondent
Town of Secaucus

DATED: January 28, 1994

APPENDIX A — OPINION — *SECAUCUS V. HUDSON COUNTY BOARD OF TAXATION, ET AL.*, DOCKET NO. L-094204-86PW (N.J. SUPER. CT. LAW DIV., JUNE 29, 1990)

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NO. L-094204-86PW

SECAUCUS,

Plaintiff,

v.

HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, CITY OF BAYONNE, BOROUGH OF EAST NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWNSHIP OF NORTH BERGEN, CITY OF UNION CITY, TOWNSHIP OF WEEHAWKEN, and TOWN OF WEST NEW YORK,

Defendants.

Decided June 29, 1990

Frances C. Holland (Holland & Holland, attorneys) and Bernard Schenkler (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, attorneys) for plaintiff.

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Harry Haushalter, for defendant Hudson County Board of Taxation (Robert Del Tufo, Attorney General of New Jersey, attorney).

Kathleen M. Grant for defendant Hudson County (Robert E. Barry, Hudson County Counsel, attorney).

Robert F. Sloan for defendant Bayonne.

Libero D. Marotta for defendant East Newark.

Richard A. Bowe for defendant Guttenberg.

Eugene P. O'Connell for defendant Hoboken.

Mary Ann Murphy for defendant Jersey City
(Joseph Healey, Corporation Counsel).

Norman A. Doyle, Jr. for defendant Kearny (Doyle & Brady, attorneys).

Herbert Klitzner for defendant No. Bergen.

Joseph S. Sherman for defendant Union City (Acheson, Pelio & Scarinci, attorneys).

Le Roy D. Safro for defendant Weehawken.

Joseph A. Apicella for defendant, West New York.

HOPKINS, J.T.C., temporarily assigned.

This case brings for constitutional review *L.* 1973, *c.* 305, § 1, codified as *N.J.S.A.* 18A:54-37, which allows certain municipalities having their own vocational education programs to

be exempted from paying their proportionate share of county taxes allocable to county vocational schools. Specifically before this court is a challenge by plaintiff, Secaucus, alleging that the provision is unconstitutional legislation in violation of both Art. VIII, § 1, par. l(a), the uniformity provision, and Art. IV, § 7, par. 9, the special legislation prohibition, of the New Jersey Constitution (1947).

The statute in question, *N.J.S.A.* 18A:54-37, reads as follows:

> Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, in any county of the first class having a population of not more than 700,000 according to the latest federal decennial census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational education program approved for the purposes of federal or State allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

As currently enacted, Bayonne is the sole municipality within the State eligible for exemption.

This matter was originally instituted by Secaucus challenging only the methodology utilized by defendant, Hudson County Board of Taxation (HCBT), to levy the county tax on

municipalities for added and omitted county tax revenues. Upon remand from the Appellate Division, the complaint was amended to allege the constitutional issues.

HCBT is the governmental agency responsible for apportioning the costs of county government, including the costs for the county vocational school, among the twelve municipalities in Hudson County. Initially, the County Board of School Estimates fixes an amount to be appropriated for county vocational school use for the ensuing year, exclusive of the amount to be received from the State. *N.J.S.A.* 18A:54-29 and -32. Once this amount has been certified under *N.J.S.A.* 18A:54-29.1, the Board of Chosen Freeholders:

> [S]hall, upon receipt of the certificate, appropriate, in the same manner as other appropriations are made by it, the amount so certified, *and the amount shall be assessed, levied, and collected in the same manner as moneys appropriated for other purposes in the county are assessed, levied, and collected, unless such amount is to be raised as otherwise hereinafter provided in this chapter.* [*N.J.S.A.* 18A:54-29.2.] [emphasis added]

To comply with both *N.J.S.A.* 18A:54-29.2 and *N.J.S.A.* 18A:54-37, HCBT developed a system whereby a two-tiered county rate was computed and applied to the various municipalities within Hudson County.[1] A county taxation rate is

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1. The twelve Hudson County municipalities which are parties to this proceeding are: Bayonne, East Newark, Guttenberg, Harrison, Hoboken, Jersey City, Kearny, North Bergen, Secaucus, Weehawken, West New York, and Union City. Harrison has defaulted.

normally determined once the budgetary needs of the county are tallied. The rate is determined per $100 of assessable property to meet those budgetary figures. Since assessment practices vary among the municipalities, the county tax burden of a municipality is based upon its equalized true value to the aggregate equalized true value of all the municipalities within the county.

The two-tiered county rate formulated was utilized to compute each municipality's proportionate share of the certified budgetary requirements for Hudson County, with the lower tier, which did not include the Hudson County Vocational School (HCVS) costs, applying to Bayonne. Thus, the two-tiered system enabled Bayonne to enjoy a lower county tax rate due to the statutory exemption. The proportionate amounts that the other eleven municipalities contributed to fund the county school absorbed Bayonne's exemption.

On February 15 of each year, municipalities must also pay to the county a share of the revenues derived pursuant to *N.J.S.A.* 54:4-63.1, *et seq.*, (added assessments of real estate), *N.J.S.A.* 54:4-63.12, *et seq.*, and *N.J.S.A.* 54:4-63.31, *et seq.*, (omitted assessments of real estate). These provisions prevent new properties constructed after the October 1 assessment date, or properties which were not included in the regular assessment list of October 1 for the tax year, from escaping taxation until the following year. Under *N.J.S.A.* 54:4-63.10,-63.22, and -63.38, the added or omitted property assessment list is multiplied by the county rate to calculate the sums due the county for added and omitted taxes.

The same two-tiered approach used for the regular assessment list was used when multiplying the added and omitted lists by the county rate. Bayonne's multiplier was the lower tier, reflecting its

exemption from funding the county vocational school, while the other municipalities paid the higher tier. None of these added or omitted tax revenues were segregated or allocated to funding the county vocational school, even though the two-tiered rate system was still being employed.

Suit was filed in Superior Court by Secaucus against the HCBT and the County of Hudson, alleging overpayment of county taxes in past years. On an Order to Show Cause before this court, it was held that the county rate applicable to added and omitted assessments in Secaucus included a portion applicable to the HCVS in Bayonne, and that such portions of the added and omitted taxes were to be placed in escrow to fund the vocational school in the next applicable budgetary year, rather than to be used for general county purposes. This procedure permitted the municipalities subject to the higher-tiered rate to recoup their excess payments in the following year's HCVS budget request.

Both plaintiff and defendants appealed that order. While acknowledging the discriminatory nature of the tax system used by defendants, the Appellate Division remanded the matter for failure to join the other affected Hudson County municipalities. It specifically declined to pass upon the validity of the trial court's remedy. By amended complaint, plaintiff challenged the constitutionality of the total statutory exemption enjoyed by Bayonne.

Kearny, East Newark, Union City, Weehawken and West New York join with Secaucus in its present motion for summary judgment. Bayonne and HCBT cross-move for summary judgment. No material issues of fact being present, this matter is suitable for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67 (1954).

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The legislative history of the disputed statute shows that *Senate Bill* 74, originally introduced for the 1972 Legislative Session, provided:

> 1. Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, each municipality included within a school district maintaining a system of vocational education approved for the purposes of Federal or State allotment of vocational funds by the Commissioner of Education under the regulations of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.
>
> 2. This act shall take effect immediately.

The Senate Committee amendments to *Senate Bill* 74 (1972) limited the scope of the statute by adding, after the word "Statutes" in the second line, "in any county of the first class having a population of not more than 700,000 according to the 1970 Federal Census."

In lines 3 and 4, the phrase "maintaining a system of" was omitted, and the following phrase added, "which has maintained for a minimum of 20 years a." Also added to line 3 was the word "program" inserted after "education."

Thus, as enacted December 14, 1973, the changes were as follows:

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1. Notwithstanding any of the provisions of chapter 54 of Title 18A of the New Jersey Statutes, in any county of the first class having a population of not more than 700,000 according to the 1970 Federal Census, each municipality included within a school district which has maintained for a minimum of 20 years a vocational education program approved for the purposes of Federal or State allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education shall be exempt from assessment, levy or collection of taxes based on any apportionment of amounts appropriated for the use of a county vocational school district.

2. This act shall take effect immediately.

As originally proposed, the bill sought to exempt from taxation amounts appropriated for the use of a county vocational school in *any* municipality which maintained a State or federally funded vocational school system. The amendment narrowed the original bill from all municipalities maintaining a "system of vocational education" by limiting its application to only those municipalities in a county of the first class having a population of not more than 700,000 which had maintained the program for a minimum of 20 years.

The statute was originally enacted as *L.* 1973, *c.* 305, § 1 and was amended by *L.* 1981, *c.* 462, § 20 by substituting "latest federal decennial census" for "1970 federal census."

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According to the 1970 and 1980 censuses, Hudson County fell within the requirements of *N.J.S.A.* 18A:54-37 as a county of the first class having a population under 700,000.

In 1970, Hudson County had a population of 607,839. *N.J.S.A.* 40A:6-1 then defined a county of the first class to be a "count[y] having a population of more than 600,000." Essex County and Bergen County, with populations of 932,526 and 897,148, respectively, were also counties of the first class, but were excluded from consideration under *N.J.S.A.* 18A:54-37 because their populations exceeded 700,000.

The 1980 census, however, showed a reduction in Hudson County's population to 556,972, jeopardizing its status as a county of the first class. The Legislature, by *L.* 1981 *c.* 462, § 44 amended *N.J.S.A.* 40A:6-1 to redefine a county of the first class as one "having a population of more than 550,000 and a population density of more than 3,000 persons per square mile." The provision for population density was a new criterion.

The following schedule shows the county population statistics as derived from the 1970 and 1980 census reports.

Counties	Population		
	1970	1980	Density per sq. mile
Atlantic	175,043	194,119	341.8
Bergen	897,148	845,385	3,567.0
Burlington	323,132	362,542	448.7
Camden	456,291	471,650	2,115.0
Cape May	59,554	82,266	312.8
Cumberland	121,374	132,866	266.8
Essex	932,526	851,116	6,701.7

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Gloucester	172,681	199,917	611.4
Hudson	607,839	556,972	12,108.1
Hunterdon	69,718	87,361	204.6
Mercer	304,116	307,863	1,356.2
Middlesex	583,813	595,893	1,885.7
Monmouth	461,849	503,173	1,066.0
Morris	383,454	407,630	865.5
Ocean	208,470	346,038	539.8
Passaic	460,782	447,585	2,393.5
Salem	60,346	64,676	191.3
Somerset	198,372	203,129	666.0
Sussex	77,528	116,119	221.2
Union	543,116	504,094	4,894.1
Warren	73,960	84,429	235.2

Under the reclassification, Hudson County retained its status as a county of the first class by virtue of its density of 12,108.1 persons per square mile. Bergen County also continued as a county of the first class with a population of 845,385 and a density of 3567.0, as did Essex County, which had a population of 851,116 with a density of 6701.7. However, Middlesex County, while surpassing Hudson County in population in the 1980 census with 595,893, had only a density of 1885.7, and did not qualify as a county of the first class.

Again, only Hudson County, with a population under 700,000, qualified under *N.J.S.A.* 18A:54-37, and only Bayonne, in Hudson County, had maintained a vocational education program approved for allotment of state or federal vocational funds for the requisite 20 years. Thus, Bayonne was the only municipality in the State which was exempt from county taxes used to support a county vocational school. Kearny, in Hudson County, would have qualified, except that its vocational school program had not been in effect for the reguisite 20 years.

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As noted, favored treatment required that a municipality have maintained, for a minimum of 20 years:

> a vocational education program *approved for the purposes of Federal or State allotment of vocational funds* by the Commissioner of Education under the regulation of the State Board of Education. . . . [emphasis added]

Federal funding of vocational education began as early as 1917 under the Smith-Hughes Act. *See* Legislative History of Pub. L. No. 94-482, *S. Rep. No.* 882, 94th Cong., 2d Sess. 42, reprinted in 1976 *U.S. Code Cong. & Ad. News*, 4713, 4753-54.

> In 1917 Congress enacted one of the earliest Federal grant programs, the Smith-Hughes Act. This legislation represented a milestone in the development of Federal aid to the States for education, incorporating provisions for the allocation of funds, State plans, development of State policymaking boards for the administration of education programs, matching requirements, and annual accountability reports to Congress. These are many of the same provisions carried through, in various forms, in present Federal education laws. The Smith-Hughes Act authorized $7 million for vocational education in agriculture, trades and industry, and home economics, and the training of teachers for these programs.

New Jersey enacted legislation as early as 1917 to accept federal funds. *N.J.S.A.* 18A:59-4. These funds are provided under

the Vocational Education Act of 1963, (Pub. L. 88-210, 77 Stat. 403), the 1976 amendments, and currently under the Carl D. Perkins Vocational Education Act, (Pub. L. 98-524, 98 Stat. 2435), 20 *U.S.C.A.* § 2301, *et seq.* These funds are accepted and distributed in accordance with *N.J.S.A.* 18A:59-4 & -5.

The requirement for apportionment or allotment of federal funds is derived from the federal legislation itself. Thus, pursuant to 20 *U.S.C.*§ 2302, Congress is required to appropriate the funds necessary for vocational education, and a formula is established for allotment of funds among the states. The procedure is described in *School Committee v. Mass. Dept. of Educ.*, 753 *F.* 2d 169, 171 (lst Cir. 1985), involving the substantially similar 1976 Act:

> The Act establishes a system of federal grant support for state and local vocational education programs, including post-secondary school programs. In order to receive grant money, a state must submit a three-year and five-year vocational education plan to the United States Department of Education detailing, among other things, what purposes the money is to serve and how it is to be allocated. If the state plan is approved by the United States Department of Education, the state receives federal funds. Local entities must apply to the Massachusetts Department of Education, for specific grants from the federal funds.

N.J.S.A. 18A:59-5 provides that the State Board of Education is the agency responsible for administration and supervision of the plan:

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> The state board is hereby designated as the state board for the purposes of said act of congress, and shall cooperate, as in the act provided, with the federal board for vocational education in the administration of the provisions thereof. The state board shall do all that is or may be required to secure for the state of New Jersey the benefits of appropriations under the act of congress for all purposes specified therein.

Further, Legislative History of Pub. L. No. 94-482, *S. Rep. No. 882*, 94th Cong., 2d Sess. 61, reprinted in 1976 *U.S. Code Cong. & Ad. News*, provides:

> The concept of the State board of vocational education as the sole State agency mandated by Federal law for the administration of vocational education programs has been a part of our nation's tradition since 1917. [at 4773]

The State Plan for Vocational Education FY 1989-1990 (June 1988) (State Plan) prepared by the Division of Vocational Education, provides that the Commissioner is the agent for the Board.

20 *U.S.C.A.* § 2322 mandates the establishment of a State council on vocational education. *N.J.A.C.* 6:41-2 created such a council. Further, 20 *U.S.C.A.* § 2323 requires federal approval of a State Plan. *N.J.A.C.* 6:43-1.1 provides that all vocational education in New Jersey shall comply with the State Plan.

> (a) Any vocational and technical educational program of less than college grade shall be conducted within the framework of a State Plan for Vocational and Technical Education approved by the State Board of Education and accepted by the United States Office of Education.

20 *U.S.C.A.* § 2325 provides for local applications for funding as follows:

> (a) Requirements; determination by State board
>
> Except as provided in subsection (c) of this section, any eligible recipient desiring to receive assistance under this chapter shall, *according to requirements established by the State board,* submit to the State board an application, covering the same period as the State plan, for the use of such assistance. The State board shall determine requirements for local applications (and amendments thereto), except that each such application shall—
>
> (1) set forth the vocational education programs, services, and activities proposed to be funded. . . . [emphasis added]

According to the 1985-86 Annual Report of the State Commissioner of Education, New Jersey received a total of $10,005,935 in federal funding. Newark alone received $923,139 of federal vocational funds. *1985-1986 Comm'r Educ. Rep. 35.* A

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computer list of federal funding by school district and by course, for 1987 and for 1988, produced by the Department of Education, shows that virtually every municipality receives at least some federal funds. 1988 computer list of Requested/Approved Funding by County produced by Bureau of Vocational Management Services, Department of Education.

In 1988, Bayonne qualified and was approved for federal funding for 13 courses, including marketing, auto body and data processing. Bayonne received over $300,000 in federal funds in 1988.

Jersey City was approved to receive in excess of $700,000 in federal funding for about 55 courses, including marketing, home economics, child care, cosmetology, carpentry, electronics and graphic arts. Kearny was approved to receive federal funds of approximately $50,000 for five courses in 1988. Even plaintiff, Secaucus, was approved to receive $19,000 in federal and state funds for two courses.

Newark, in Essex County, was approved to receive over $1.0 million in federal funds for approximately 60 courses in 1988. In Bergen County, New Milford was approved to receive some $4,000 in federal funds for two courses. Englewood received over $12,000 for three courses. Hackensack was approved to receive over $30,000 for four courses. Lyndhurst was approved to receive $45,000 for 13 courses. Elizabeth, in Union County, was approved to receive almost $400,000 in federal funds for 35 courses.

Thus, the Commissioner of Education (the designated representative under the State Plan) approves programs for allotment of federal funds, under regulation of the State Board of Education, *i.e.*, the State Plan promulgated by the Board.

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It can be said that virtually every municipality in New Jersey maintains:

> a vocational education program approved for the purposes of federal . . . allotment of vocational funds by the Commissioner of Education under the regulation of the State Board of Education. . . .

State categorical aid for vocational education is paid to designated "Local Area Vocational School Districts" (LAVSD). *N.J.A.C.* 6:46-2.1. To qualify for the LAVSD designation and funding, such districts must operate at least two programs in defined occupational areas such as agriculture, health, home economics, marketing or technical education; provide secondary education programs in trade; and comply with other administrative requirements. *N.J.A.C.* 6:46-2.3. A "program" is defined in *N.J.A.C.* 6:46-1 as "the planned sequence of courses, services or activities designed to meet a vocational objective." This definition was promulgated in 1982, after the 1973 enactment of *N.J.S.A.* 18A:54-37.

The LAVSD designation was established in 1982. *See Sen. Educ. Comm. Statement A No.* 1660, *L.* 1980, *c.* 102 to *N.J.S.A.* 18A:7A-1, *et seq.* The formerly designated Area Vocational Technical Schools had evolved from the 1963 Vocational Act. That act allocated funding, 50% from the federal government, 25% from the State and 25% from the district. Federal funds ran out in the mid-1970's, and funding for vocational education was effectively supplanted through chapter 212 of the Public School Education Act of 1975, *N.J.S.A.* 18A:7A-1, *et seq.*

Bayonne receives state categorical aid funding for vocational

education on account of its vocational education in its high school. Bayonne's school district is a designated LAVSD. The school district of Kearny, in Hudson County, is also a designated LAVSD, as are school districts in 16 other municipalities in the State.

The following shows the State funding for approved LAVSD's for 1985-1986:

Bayonne (Hudson)	$698,601
Black Horse Pike Regional (Camden)	483,131
Camden City (Camden)	841,502
Deptford Township (Gloucester)	264,643
Elizabeth (Union)	564,507
Hunterdon Central (Hunterdon)	335,258
Kearny (Hudson)	290,693
Linden (Union)	349,770
Lower Camden County Regional (Camden)	492,452
Matawan-Aberdeen (Monmouth)	361,022
Millville (Cumberland)	301,008
Morris Hills Regional (Morris)	412,700
North Hunterdon (Hunterdon)	476,362
Red Bank Regional (Monmouth)	160,350
Trenton (Mercer)	656,472
Union County Regional (Union)	249,434
Union Township (Union)	368,524
Willingboro (Burlington)	527,936

New Jersey also has other county vocational schools. *N.J.S.A.* 18A:54-11, *et seq.* According to the State Department of Education, as of September 1, 1988, there were 20 county vocational schools in existence. They are funded by the State, by virtue of *N.J.S.A.* 18A:7A-24, and also receive federal funds. To the extent they are not otherwise funded by State or federal

revenues, county vocational schools are funded by each county, which funding needs are "assessed, levied and collected in the same manner as moneys appropriated for other purposes in the County." *N.J.S.A.* 18A:54-29.2.

Most of the county vocational school districts, including Hudson County, also contain designated LAVSD's. Both Bayonne and HCVS are LAVSD's and receive State categorical vocational aid funding in addition to federal funds.

The HCVS commenced operations in its own facility in the 1974-1975 school year, although its Board of Education was first constituted in 1965. Its records for 1972 show a resolution directing negotiations for the acquisition of a school building. A budget estimate for approximately $2.0 million was prepared in early 1973. It was at that time that the subject statute was enacted.

Since at least the early 1930's, Bayonne has maintained a vocational education program. Initially, its vocational program was operated through a separate vocational high school. By the 1960's, the vocational program had become fully integrated with Bayonne's comprehensive high school. There is no "vocational education" student, *per se*. In Bayonne's vocational program, long considered a model, vocational education students fully participate in school activities with other students and attend many classes with non-vocational education students.

There is no prohibition against Bayonne students or residents from attending HCVS.

On February 15 of each year, in addition to the regular installments of county taxes, a municipality must pay to the county an amount determined by multiplying the total of added or omitted

assessments "by the county . . . rate." *N.J.S.A.* 54:4-63.10, 63.22, 63.38. The added and omitted assessment statutes, discussed *supra*, all provide that each municipality must pay a portion of its added and omitted assessment taxes to the county. These amounts were paid at the two-tiered rate.

The parties have stipulated that no part of the funds paid to Hudson County on account of added and omitted assessments are segregated for or paid for the use of the county vocational school. All of the county taxes attributable to the added and omitted taxes became part of general funds used to fund Hudson County general expenditures. By reason of the two-tiered county rate, Bayonne taxpayers were exempted from paying the same portion of the taxes resulting from the added or omitted assessments, even though all such funds were used for general county government purposes.

The constitutional provisions restricting legislative enactments exempting local real property from taxation are expressed in *N.J. Const.* (1947) Art. VIII, § 1, par. 1(a) and par. 2, which read as follows:

> 1. (a) Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.
>
> * * * *

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> 2. Exemption from taxation may be granted only by general laws. Until otherwise provided by law all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

The leading case on the construction to be given to the above constitutional provisions is *N.J. State League of Municipalities v. Kimmelman*, 105 *N.J.* 422 (1987). That case involved the constitutionality of a statute which prohibited newly constructed single-family dwellings from being added to real property assessment lists until a certificate of occupancy had been issued and the dwelling had actually been occupied. The court reviewed the history of the constitutional paragraphs to show the intent of the framers before concluding that the statute violated both the uniformity provisions of Par. 1(a) and the requirement that exemptions be granted only by general laws, as contained in Par. 2.

In so doing, the court recognized the constitutional limitations on taxation, as well as the cases construing those limitations prior to the 1947 Constitutional Convention. Such background was necessary to fully implement the constitutional requirement that all real property shall be assessed according to the same standard of value and taxed at the general tax rate of the taxing district.

It was pointed out that for almost 75 years, the New Jersey

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Legislature and the courts, in the development of tax policy, were guided by the provisions of the 1844 New Jersey Constitution, Art. IV, § 7, par. 12, which read as follows: "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

In its review, the court relied heavily upon a monograph by Aaron K. Neeld, contained in 2 *Proceedings of the State of New Jersey Constitutional Convention of 1947*, 1685 (S. Goldman & H. Crystal, ed. 1951), for the history of that tax policy. It was pointed out that all taxes are state taxes, even though levied for county and municipal purposes, and that such power, an essential attribute of sovereignty, is unlimited in scope except as may be restrained by constitutional inhibition or irrepealable legislative contract. Under the 1844 Constitution, class taxation was valid, as long as there was compliance with the classification rule that all reasonably within the class were included, that uniformity prevail throughout the whole class, and that the property be taxed at true value. However, it was regularly held that classification must be of *property* according to its characteristics, or the use to which it is put and not according to the status of the owner or the mere incidence of location of the property. Relying upon Neeld's *Proceedings, supra,* the court further stated that the 1844 Constitution tax clause did not require that *all* property shall be assessed for taxes. Rather, the Legislature could classify properties for purposes of exemption from taxation, subject always, of course, to strict observance of the classification rule. Elimination of a single member of the natural class would invalidate the statute. *See League, supra,* at 428-429.

In support of those principles, the court also pointed out that an attempted special exemption of $500 for firemen had been voided on the ground that instead of classifying property for the purpose of exemption, either by characteristics or by its uses, the

legislation classified the owners of the property according to characteristics possessed by them, regardless of the characteristics possessed by the property and of the uses to which it was put. *Tippett v. McGrath*, aff'd 71 *N.J.L.* 338 (E. & A. 1904). Further, an attempt to exempt new improvements of real property for a period of five years had also been voided on the basis of improper classification. *Koch v. Essex County Board of Taxation*, 97 *N.J.L.* 61 (Sup. Ct. 1922), and *Braunstein v. Jersey City*, 98 *N.J.L.* 478 (E. & A. 1923). Continuing, the court pointed out that subsequently, an exemption by classification had been held valid for purposes of industrial encouragement. *Schwartz v. Essex County Bd. of Taxation*, 129 *N.J.L.* 129, 133 (Sup. Ct. 1942), aff'd 130 *N.J.L.* 177 (E. & A. 1943), and *Burlington Distilling Co. v. State Board of Assessors*, 86 *N.J.L.* 92 (Sup. Ct. 1914), aff'd 87 *N.J.L.* 315 (E. & A. 1915). This latter construction formed the basis for the preferential tax treatment of railroads when the Railroad Tax Law was revised to dedicate the proceeds of second class railroad taxes to municipalities, but the rate of property taxation was fixed at only 3% per $100 value, notwithstanding the fact that the figure was well below the average tax rate for the State. *See Jersey City v. Kelly*, 134 *N.J.L.* 239 (E. & A. 1946), modifying *Jersey City v. State Board of Tax Appeals*, 133 *N.J.L.* 202 (Sup. Ct. 1945). Such favorable treatment was judicially approved on the basis that it was a permissible means to "ease and make more flexible the burden of taxation of railroad property." *State v. State Board of Tax Appeals*, 134 *N.J.L.* 34, 41 (1946), aff'd o.b., 135 *N.J.L.* 482 (E. & A. 1947)

The favored treatment of railroads was the subject of much discussion at the 1947 Constitutional Convention. The State League of Municipalities there took the position that the judicial approval of the railroad legislation was the first such approval since the adoption of the tax clause in the Constitution of 1875, and that the courts now construed that clause to permit the Legislature

not only to segregate real property for valuation purposes, but also to deliberately assess it at a lower rate than that paid by other property.

It was against this background that the present uniformity and exemption clauses were promulgated. Again, as shown in the *League* case, the political compromise that evolved was that there would be a deletion of the true value requirement from the tax clause. However, the Constitution would require that as to the taxation of real property, then and now the lifeblood of local government, discriminatory burdens would be forever barred. *League* at 433. After considering all of the above, the *League* court held that it was required to reconcile the restraint on the power of the Legislature, as imposed by the uniformity and general exemption clauses, with the power to grant exemptions. It achieved this reconciliation by recognizing that when the delegates dealt with the exemption power, "they considered it as being exercised in the historical mold of the public purpose — then seen primarily as educational, charitable and religious purposes." *League* at 435.

The court then stated:

> [G]iven that the single galvanizing event that brought about the agreement on a tax article was a compromise that gave greater flexibility to the executive and legislative branches in taxing all types of property other than real estate, with the apparent purpose of providing that real property dedicated to municipal tax purposes should never be taxed at an unequal burden, we cannot conclude that the delegates intended that the Legislature

> could achieve, by the exemption clause, what could not be done under the constitutional restraints imposed upon it. For no matter whether viewed as a classification or as an exemption, it is clear that the purpose of the challenged provision is to aid an ailing industry. [at 436]

The court went on to point out that prior judicial decisions were consistent in upholding the constitutional provision against preferential property tax treatment. *See Switz v. Kingsley,* 37 *N.J.* 566 (1962), holding unconstitutional preferential property treatment for qualifying farmlands by assessing such property at its value for agriculture, rather than at its fair market value. Subsequently, the Constitution was amended to permit such favored treatment.

The *League* court, based upon the history of the uniformity clause, found that it was enacted for the purpose of providing that real property dedicated to municipal tax purposes should never be taxed at an unequal burden and that the exemption clause could not be used to undermine that proscription.

The subject statute specifically excludes Bayonne property owners from that portion of Hudson County property taxation used to support the HCVS. By statute, except as to the subject exemption, all local property must be taxed, at its equalized value, to support county government, including county vocational schools. *N.J.S.A.* 18A:54-29.2, *N.J.S.A.* 54:4-41 and -47. The subject statute authorizes a disparate treatment in the taxation of other Hudson County municipalities for the benefit of Bayonne's property owners. This favorable status is based on the "mere incidence of location." *League* at 429. *See N.J. Turnpike Authority*

v. Washington Tp., 16 *N.J.* 38 (1954), requiring that an exemption can only be justified on the basis of the *use* of the property. The uniformity clause prohibits favored treatment in the taxation of real property, regardless of a legislatively determined justification. Under those circumstances, *N.J.S.A.* 18A:54-37 is in conflict with the uniformity clause and is invalid.

Plaintiff also attacks the subject statute as special legislation creating an unnatural and arbitrary classification specifically for Bayonne and excluding similarly situated municipalities which, except for their failure to meet the county population provisions and failure to have maintained a vocational education program for 20 years, would have been eligible for the tax exemption.

The uniformity clause requires property to be assessed by general legislation and Art. IV, § 7, par. 9 (6) specifically prohibits any special legislation relating to taxation or exemption therefrom. Special legislation is described in 73 *Am.Jur. 2d Statutes* § 6 (1964), as follows:

> Ordinarily, a statute is regarded as a "special law" if it does not have a uniform operation. Within the meaning of this rule, a statute does not have a uniform operation if it does not relate to persons, entities, or things *as* a class, but to particular persons, entities or things *of* a class. A classification renders a statute special where it is made to depend, not upon any natural, real, or substantial distinction, but rather upon purely artificial, arbitrary, illusory, or fictitious conditions, so as to make the classification unreasonable and unjust. Sometimes, it is said that a law is

> special where its classification is not based upon some reasonable and substantial difference in kind, situation, or circumstance bearing a proper relation to the purpose of the statute, but embraces less than the entire class of persons to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed. [emphasis added]

Plaintiff does recognize that it has the burden to demonstrate clearly that the statute violates the constitutional provisions and that there is a presumption of constitutionality. *Mahwah Tp. v. Bergen County Bd. of Taxation*, 98 *N.J.* 268, 282 (1985), *cert.* den. 471 *U.S.* 1136, 105 *S. Ct.* 2677, 86 *L.Ed.2d* 696 (1985), which is the latest Supreme Court opinion discussing special legislation in the context of taxation, is particularly instructive in the principles to be utilized in reviewing a statute for that deficiency. At issue there was *N.J.S.A.* 54:4-5, *L.* 1922, *c.* 130, which provided a rebate of a portion of a municipality's share of county taxes if the municipality was located in a first class county with a population in excess of 800,000, and had within its borders 200 acres or more of land used and occupied by a state or county institution. The act's purpose, as originally enacted, was stated by the Legislature as follows:

> This bill is proposed to correct an injustice to the Township of Cedar Grove wherein the Overbrook Hospital is situated. The township is compelled to furnish tuition to the children of various officials and attendants employed there, and is also compelled to record the vital statistics and to furnish protection to the inhabitants of said hospital, without receiving

a dollar in return. (Statement 3, accompanying P.L. 1918 p. 8471) [*Mahwah* at 275]

In holding the statute, as originally enacted, to be constitutional, the court emphasized certain principles. First, a statute is presumed to be constitutional and will not be declared void unless the statute is clearly repugnant to the Constitution. Further, citing from *In re Loch Arbour*, 25 *N.J.* 258, 265 (1957), the court stated that "[a]dded force is given to these basic concepts by the further policy of our law not to invalidate a statute which has been in force without a substantial challenge for many years, unless its unconstitutionality is obvious." *Id.* at 282.

The second principle is that the burden is on the party challenging the constitutionality of the statute to demonstrate clearly that it violates a constitutional provision. *Mahwah* at 283. The last principle, one that is of longstanding validity, is that in deciding whether an act is special or general legislation, the determining factor is what is excluded, not what is included.

It then adopted the three-pronged test set forth in *Vreeland v. Byrne*, 72 *N.J.* 292 (1977). This test includes consideration of the purpose and object of the legislation, examination of the factual situation under review in order to determine whether any one thing is excluded that should be included, and lastly, determination of whether the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act.

Applying the above principles to the subject statute, its history shows that as first proposed, it was applicable to any municipality included within a school district maintaining a system of vocational education approved for the purposes of federal or state

allotments of vocational funds by the State. However, as finally enacted, it was restricted to municipalities in those first class counties having a population of not more than 700,000 according to the 1970 federal census, which municipalities had maintained, for a minimum of 20 years, a vocational education program approved to receive federal or state vocational funds. Only Hudson County gualified as a county of the first class with a population less than 700,000, and only Bayonne qualified as having a vocational program in existence for the minimum 20 years. The Senate Education Committee Statement to *Senate Bill* 74 (1972) left no doubt as to the legislative intent:

> This bill, as amended, would exempt the city of Bayonne from any assessment of taxes due to the cost of supporting the county vocational school in Hudson County.

The statute was amended in 1981 to substitute "latest Federal decennial census" for "1970 Federal census."

At the same time, by *L.* 1981, *c.* 462, § 44, *N.J.S.A.* 40A.6-1, the definition of a first class county was revised from a county having a "population of more than 600,000" to a county having a "population of more than 550,000 and a density of more than 3,000 persons per square mile." This change in the definition of a first class county must be reviewed in the context of the 1980 census showing that Hudson County's population had decreased from 607,839 in 1970 to 556,972 in 1980. As such, without the amended definition, Hudson County would have lost its status as a first class county as of 1980. Further, in reducing the required population number, the Legislature also added the population density per square mile standard for which Hudson also qualified. Although Middlesex County had a larger total population, it could not meet the density requirement.

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Bayonne continued to be the only school district qualifying under the subject statute, and only Bayonne taxpayers enjoyed the exemption from contributing to county vocational schools.

It is recognized that if the classification is otherwise valid, it is not rendered invalid by the fact that it applies to only one city in the state. A statute is not unconstitutional special legislation merely because it addresses the needs of a particular municipality or serves a particular legislative purpose. *Mahwah* at 285. Accordingly, the legislators' motivation in adopting the subject statute in order to ameliorate the perceived hardship of Bayonne in 1971, and their efforts to continue that relief in the amendments in 1981, may not be fully determinative of the constitutionality of the statute inasmuch as other school districts could come within its scope. However, the history here shows that such was not the case and the restrictions, particularly having such programs in existence for at least 20 years, would make it unlikely that any school district would qualify until some time in the future. Indeed, the record reflects that except for the 20 year restriction, Kearny would qualify, since it is located in Hudson County but had its program in effect for only 6 years in 1986. That feature, together with the general recognition of the need to encourage vocational education programs, requires a finding that the statute was specifically drafted not only to include Bayonne, but, in such restrictive terms, as to make it highly unlikely that any other equally impacted school district could qualify within any reasonable period of time.

The final prong of the *Vreeland* test is whether the act rests upon a rational basis justifying the classification.

Classification by population, however, must be analyzed with the following "bottom line" as noted in *In re Loch Arbour, supra,* citing *Paul v. Gloucester County,* 50 *N.J.L.* 585, 592 (E. & A. 1888):

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> The extreme limit of our inquiry in this direction is, Does population bear any reasonable relation to the subject to which the legislature has applied it: is it germain [sic] to the law?

In *Mahwah*, as well as in *Newark Superior Officers Ass'n., et al., v. Newark, et al.*, 98 *N.J.* 212 (1984), the court held that a statute based upon a population classification was not invalid, *per se*. It there pointed out that cities with larger populations had specific problems which could very well be addressed without giving the same remedy or relief to lesser populated cities. The same would apply to populations between various numbers where those numbers would represent a population criterion reasonably associated with the restricted application of the legislation.

As noted in *Mahwah*, the case of *Owens v. Fury*, 55 *N.J.L.* 1 (Sup. Ct. 1892), upheld a statute transferring the greater part of the appointive powers of common councils to the mayor in cities with populations between 50,000 and 100,000. Emphasizing the distinction between the greater public concern for such offices in cities of more than 50,000, the court found the classification to have a rational basis. However, in *Raymond v. Teaneck*, 14 *N.J. Misc.* 487, 490 (Sup. Ct. 1936), aff'd 118 *N.J.L.* 109 (E. & A. 1937), the court considered legislation that fixed the tenure of tax assessors and limited it to cities of a population no less than 135,000 and no more than 200,000. The court there stated:

> [W]e cannot discover any sound reason why one body of assessors or one type of assessor should be continued in office in a given locality of the state and another performing the same service and holding the

> same office should be excluded. If continuance in office because of experience, security in office and freedom from political influence be desirable in a population up to one hundred and thirty-five thousand, it is difficult to understand why it should not be desirable in a population of from one hundred and thirty-five thousand to two hundred thousand or over three hundred thousand, and if desirable respecting assessors generally, why not equally desirable when the assessment is by commissioners of assessment in the excluded municipalities. . . .

Also, population was held not to be a reasonable classification in *Koons v. Atlantic City,* 134 *N.J.L.* 329 (Sup. Ct. 1946), aff'd o.b. 135 *N.J.L.* 204 (E. & A. 1947). In that case, a retail sales tax was authorized for any city with a population in excess of 50,000 and bordering on the Atlantic Ocean. The legislative purpose was to assist Atlantic City in recovering from recent hurricane damages. The court, however, found that other shore municipalities had also been damaged by the hurricane, and were improperly and artificially excluded by the statute.

The above principles are equally applicable here. The maintenance of a vocational education program by a municipal school system, which also contributes to a county vocational school, if a hardship, is a widespread one which is not restricted by a population criterion. Bayonne, or any other municipality that could possibly meet the statutory requirements, represent only a fraction of the municipalities with the same common problem. There are some 20 county vocational schools in the State and numerous school districts with qualified vocational education

programs. The perceived evidence of double contribution cannot be measured, in its impact. by population restrictions. The classification by population, including population density per square mile, effectively excludes the many municipalities with the same perceived hardship. As such, *N.J.S.A.* 18A:54-17 also violates the constitutional proscription against special legislation.

It is concluded that the subject statute fails constitutional muster both under the uniformity clause and as special legislation.

The issue originally presented to the court was whether the statute should have been construed to require the HCBT to compute another county tax rate for the added and omitted assessment taxes paid by the non-Bayonne municipalities, in order to permit these municipalities to retain those second-tier amounts. Secaucus requests this remedy. The county, in turn, wishes to continue the procedure, presently in existence, whereby the money is paid to the county, and the county uses the funds for general purposes.

This court, at the first hearing, found that the methodology through which the county kept such funds for general county purposes resulted in a discriminatory treatment of the non-Bayonne municipalities in that such additional payments by them for general county purposes discriminated in favor of Bayonne taxpayers. That holding was based upon the principles enunciated in *Clifton v. Passaic County Board of Taxation*, 28 *N.J.* 411 (1958), and the well-established principle that there is only one county tax rate, even though, as in this case, it was a two-tiered rate. The county collection of funds received from the second-tier rate as applied to added and omitted assessments and their use for general purposes evidence discrimination in favor of Bayonne.

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In statutory construction, it is important that the legislative policy be kept in mind. *Clay v. East Orange*, 177 *N.J. Super.* 79, 84 (Law Div. 1980), aff'd 181 *N.J. Super.* 40 (App. Div. 1981), aff'd 91 *N.J.* 429 (1982). That case relied upon *New Capitol Bar & Grill Corp. v. Div. of Employment Security*, 25 *N.J.* 155 (1957), where the court stated:

> It is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them. Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design. It is the proper function, indeed the obligation of the judiciary to give effect to the obvious purpose of the Legislature, and to that end "words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms." *Alexander v. New Jersey Power & Light Co.*, 21 *N.J.* 373, 378 (1956); *Wright v. Vogt*, 7 *N.J.* 1, 6 (1951); *Glick v. Trustees of Free Public Library*, 2 *N.J.* 579, 584 (1949). Additionally, the statute before us is remedial and should be liberally construed to accomplish the social aim of the Legislature. *Campbell Soup Co. v. Board of Review, Division of Employment Security*, 13 *N.J.* 431 (1953) [at 160]

The above principles were also used in *Robson v. Rodriquez*, 26 *N.J.* 517, 528 (1958) and *Clifton v. Passaic Tax Bd., supra.*

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Applying those principles, it is obvious that the legislation was directed to relieve Bayonne-type municipalities from contributing to county vocational schools. It was never intended that Bayonne obtain the extra benefit of also receiving favorable treatment in the payment of Hudson County's general operating costs. This is the basis of Secaucus' complaint. However, as there is only one annual tax rate, appropriate construction, in furtherance of the legislative policy, would be to make certain that the second-tier payments from added and omitted assessments are utilized to confine Bayonne's favored treatment in contributing to the HCVS budget. In order to avoid discriminatory treatment in favor of Bayonne, to maintain the validlty of one county tax rate, and to ensure that taxes paid as HCVS costs are used for such purpose, the statute should be expanded to provide that such extra payments be used to reduce the HCVS budget impost for the following year. By earmarking such funds for that purpose, the following year's HCVS budget, as funded by the non-Bayonne municipalities, will be reduced and the discriminatory practice corrected.

Relief will be granted to the plaintiff and similarly situated Hudson County municipalities by application of the excess two-tiered payments to the HCVS budget commencing with the year subsequent to the filing of the original complaint in 1986. Full relief from the unconstitutional statute will commence with the elimination of the two-tiered county rate commencing with the county rates determined subsequent to May 27, 1988, the filing date of the motion to amend the complaint to allege the unconstitutionality of *N.J.S.A.* 18A:54-37. *See Alfred Vail Mutual Assoc. v. Halpin*, 107 *N.J. Super.* 517, 533-534 (App. Div. 1969), aff'd 58 *N.J.* 40 (1971).

Plaintiff will submit a proposed form of judgment pursuant to the five-day rule in accordance with the above.

APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT — *TOWN OF SECAUCUS V. HUDSON COUNTY BOARD OF TAXATION, ET AL.*, DOCKET NO. L-094204-86 PW (N.J. SUPER. CT. LAW. DIV., JULY 27, 1990)

HOLLAND & HOLLAND, P.C.
400 Plaza Drive
Secaucus, New Jersey 07094
(201)-864-1300
Co-Counsel to Plaintiff

RAVIN, SARASOHN, COOK,
BAUMGARTEN, FISCH & BAIME
103 Eisenhower Parkway
Roseland, New Jersey 07068
(201)-229-9600
Co-Counsel to Plaintiff

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. L-094204-86 PW

CIVIL ACTION

TOWN OF SECAUCUS,

Plaintiff,

- vs -

HUDSON COUNTY BOARD OF TAXATION, COUNTY OF HUDSON, CITY OF BAYONNE, BOROUGH OF EAST

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NEWARK, TOWN OF GUTTENBERG, TOWN OF HARRISON, CITY OF HOBOKEN, CITY OF JERSEY CITY, TOWN OF KEARNY, TOWN OF NORTH BERGEN, CITY OF UNION CITY, TOWN OF WEEHAWKEN, and TOWN OF WEST NEW YORK,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER having been presented to the Court by Holland & Holland, P.C., (Frances C. Holland, Esq. appearing) and Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, (Bernard Schenkler, Esq. appearing), co-counsel to Plaintiff, Town of Secaucus, in the presence of Robert Del Tufo, Attorney General (Harry Haushalter, Deputy Attorney General appearing); Kathleen M. Grant, Esq., Assistant Hudson County Counsel; Robert F. Sloan, Esq., attorney for defendant Bayonne; Libero D. Marotta, Esq. attorney for defendant East Newark; Richard A. Bowe, Esq., attorney for defendant Guttenberg; Eugene O'Connell, Esq., attorney for defendant Hoboken; Mary Ann Murphy, Esq., attorney for defendant Jersey City; Norman A. Doyle, Esq., attorney for defendant Kearny; Herbert Klitzner, Esq., attorney for defendant North Bergen; Joseph S. Sherman, Esq., attorney for defendant Union City; Le Roy D. Safro, Esq., attorney for defendant Weehawken; and Joseph A. Apicella, Esq., attorney for defendant West New York; on a motion for summary judgment, and the Court having considered the moving and opposing papers and argument of counsel and for the reasons set forth in a written opinion dated June 29, 1990, and good cause being shown;

IT IS on this 9th day of August 1990;

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ORDERED, that summary judgment be and hereby is granted in favor of Plaintiff as follows:

1. *N.J.S.A.* 18A:54-37 be and hereby is declared unconstitutional and invalid under the uniformity clause of the Constitutional, Art. VIII Sec. 1 and under the constitutional proscription against special legislation, Art. IV., Sec. 7, Par. 9(6).

2. The methodology utilized by the defendant Hudson County Board of Taxation pursuant to *N.J.S.A.* 18:54-37 to collect the second-tier county tax from the non-Bayonne municipalities for added and omitted assessments and to retain and use the additional funds for general county purposes be and hereby is invalidated as discriminatory in favor of defendant Bayonne and said invalidation applies to applications of excess two-tiered payment to the general county budget commencing with the tax year 1986; and

3. The Hudson County Board of Taxation shall calculate the amount collected from the eleven Hudson County municipalities other than Bayonne on account of added and omitted assessments between 1986 and May 27, 1988, and calculate the reduced amount which should have been due and payable from the eleven Hudson County municipalities, other than Bayonne, had the added and omitted assessment tax proceeds been segregated and applied to reduction of the subsequent tax year's County Vocational School Budget. the Hudson County Board of Taxation shall further calculate any reallocation of the apportionment of the Hudson County Budget among all twelve municipalities including Bayonne. Any debits and credits shall be set forth in the 1990 Hudson County Abstract of Ratables to be adopted by the Hudson County Board of Taxation; and

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4. The Hudson County Board of Taxation shall calculate as a debit of Bayonne its proportionate share of the cost of the budget of the Hudson County Vocational School from and after May 27, 1988 and the resultant credits to the remaining eleven Hudson County municipalities for over-payments on for the budget of the Hudson County Vocational School from or after May 27, 1988. Any such debits and credits shall be set forth in the 1990 Hudson County Abstract of Ratables to be adopted by the Hudson County Board of Taxation; and

5. For the tax year 1990 and thereafter, the two-tiered system implemented by the Hudson County Board of Taxation under *N.J.S.A.* 18:54-37 is abolished and the cost of funding the Hudson County Vocational School shall be included in the general county budget. Hudson County taxes shall be apportioned among the twelve municipalities in the 1990 Hudson County Abstract of Ratables by the Hudson County Board of Taxation according to a single county rate and in every tax year thereafter is to be so apportioned in the Hudson County Abstract of Ratables.

s/ John J. Hopkins
Hon. John J. Hopkins, J.T.C. t/a

APPENDIX C—OPINION – *TOWN OF SECAUCUS V. HUDSON COUNTY BOARD OF TAXATION AND COUNTY OF HUDSON,* DOCKET NO. A-4854-86T8 (N.J. SUPER. CT., APP. DIV., MAY 18,1988)

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATEDIVISION
A-4854-86T8

TOWN OF SECAUCUS,

Plaintiff-Appellant-
Cross-Respondent,

v.

HUDSON COUNTY BOARD OF TAXATION AND COUNTY OF HUDSON

Defendant-Respondents-
Cross-Appellants.

Argued February 29, 1988 — Decided May 18, 1988

Before Judges O'Brien, Havey and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County.

Bernard Schenkler argued the cause for appellant-cross-respondent (Holland & Holland, and Ravin, Sarasohn, Cook,

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Baumgarten, Fisch & Baime, attorneys; Lewis M. Holland on the brief and Bernard Schenkler on the reply brief).

Harry Haushalter, Deputy Attorney General, argued the cause for respondents-cross-appellants (W. Cary Edwards, Attorney General of New Jersey, attorney for respondent-cross-appellant, Hudson County Board of Taxation; Michael R. Clancy, Deputy Attorney General, of counsel; Mr. Haushalter on the brief).

Respondent-cross-appellant Hudson County relies on the brief submitted by the Attorney General.

PER CURIAM:

This appeal and cross-appeal challenge a ruling by the Law Division relating to how property tax revenue from added and omitted assessments should be fixed and allocated. Defendants Hudson County and the Hudson County Board of Taxation (County Board) challenge the trial court's ruling "that the carry-over of [the general tax rate] to the added and omitted assessments and the ability and the actual use of the total amount paid to the County on that at [the general tax rate] creates an undue burden on non-Bayonne municipalities." All parties challenge the consequent judgment entered which provides that "that portion of added and omitted taxes received by Hudson County from the Hudson County municipalities reflective of the Hudson County Vocational School rate component shall be utilized solely for funding the Hudson County Vocational School," and that "[t]hat

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. . . portion of the added and omitted taxes collected by the county and applied solely for funding the [school] shall be deducted from the amount of monies needed to be raised through the local property tax levy in that tax year for the [school]."

Plaintiff appeals from the remedy embodied in the judgment and defendants cross-appeal. We reverse and remand for further proceedings.

The dispute in this case flows from the fact that taxpayers of Bayonne, which has its own vocational school, have been exempted by statute from contributing to the funding of the Hudson County Vocational School, which is funded from the county budget. *See N.J.S.A.* 18A:54-37.

As a consequence of the exemption, municipalities other than Bayonne, including plaintiff Town of Secaucus, must contribute for a county service not paid by Bayonne taxpayers, and the general tax rate for the municipalities other than Bayonne is higher than the general tax rate for Bayonne.

I.

The Hudson County Board of Taxation created a two-tier rate based on Bayonne's exemption. With respect to regular assessments, the municipalities other than Bayonne pay property taxes based on a rate for their share of county taxes, and a separate additional amount, calculated by using a separate rate, which exclusively funds the county vocational school. Bayonne, by reason of the statutory exemption, pays its taxes based on the "county rate" without regard to the vocational school. Consequently, its "county rate" is lower than the rate for the other 11 municipalities.

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Plaintiff instituted this action by complaint in lieu of prerogative writs in the Law Division seeking exclusion of the County Vocational School costs from the rate used for added and omitted assessments. Plaintiff challenged the county board's decision to employ a "county rate" for added and omitted assessments consisting of the rate applicable to each municipality including county taxes and the separately delineated rate for the county vocational school budget utilized outside of Bayonne. Plaintiff claimed that the system is unauthorized by statute and is unfair to all of the municipalities in Hudson County except Bayonne, because it required them to pay more than their fair share to the county and because the added and omitted assessments do not apply to defray the costs of the county vocational school. Thus, it claimed that the added and omitted statutes should not include the component representing the county vocational school.

The Law Division agreed that the present method unfairly discriminated against non-Bayonne municipalities, but the judge declined to construe the statutes in the manner urged by plaintiff. Rather, he fashioned a remedy which in effect required the county to escrow or set aside in a separate fund that portion of added and omitted assessments revenue attributable to the rate fixed for the vocational school budget.

No party is satisfied with this result. Plaintiff and defendants argue that there is no statutory authority for what the judge did. Plaintiff claims the judge should have adopted its suggested remedy, namely interpreting the "county rate" as not including that rate for the vocational school. Defendants urge that there was no reason for the judge to change the existing system in the absence of additional legislation on the subject. They contend that the present system is contemplated by the existing legislation.

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II.

We initially reject defendants' claim that the complaint is untimely as filed more than 45 days after the county board notified plaintiff of its obligations with respect to the added and omitted assessment for 1987. While plaintiff sought credits for overpayments from prior years against the 1987 assessment, it also sought declaratory relief for future years, and the case involves substantial and recurring issues of public importance and constitutional law. *See R.* 4:69-6(c) (enlargement of time "where it is manifest that the interest of justice so requires"). *See also Reilly v. Brice*, 109 N.J. 555 (1988); *Schack v. Trimble*, 28 N.J. 40 (1958). We also reject defendants' further contention that review of a decision by the county board of taxation must be filed in the Tax Court. While the action in lieu of prerogative writs was properly before the Law Division, the case was properly assigned to a judge of the Tax Court temporarily assigned to the Law Division to hear this case. *See Alid., Inc. v. Town of North Bergen*, 89 N.J. 388 (1981). Moreover, the judge noted that it was being consolidated, with a case then pending in the Tax Court involving the same parties and seeking the same relief.[1]

III.

On February 15 of each year a municipality must, in addition to the regular installment of county taxes, pay to the county an amount determined by multiplying the total of added or omitted assessments "by the county . . . rate." *N.J.S.A.* 54:4-63.10, 63.22,

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1. The judge also noted that the matter was being consolidated with a matter subsequently filed in the Tax Court seeking reduction of the 1987 rate and declaratory relief. We note that, if not already accomplished, the judge can perfect the consolidation on remand.

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63.38. However, the statutes do not define the phrase "county rate." Thus, the issue is whether to construe the phrase "county rate" as applying merely to the rate for county expenditures common to all municipalities and their taxpayers, as plaintiff urges, or the rate for county expenditures including those related to the county vocational school, as urged by defendants.

The obligation of the trial court is to interpret what the legislature meant by the phrase "county rate" in these circumstances. *County of Bergen v. Borough of Paramus*, 79 *N.J.* 302, 306 (1979). As the judge noted, it has long been held that the overall goal of the Legislature is to apportion the cost of county government among its constituent municipalities as equally and as impartially as possible. *Clifton v. Passaic County Board of Taxation*, 28 *N.J.* 411, 418 (1958). Absolute equality is a practical impossibility, but it is the duty of the county board to minimize as far as possible the unfair distribution of county taxes among constituent municipalities. *City of Passaic v. Passaic County Bd. of Taxation*, 18 *N.J.* 371, 381 (1955). *Clifton v. Passaic County Board of Taxation*, *supra*, applied that principle in ascertaining what should be the proper "county rate" for purposes of added and omitted assessments where the issue related to the standard of value. 28 N.J. at 420.

Thus, the "county rate" for Hudson County must be that rate which most equitably distributes the burden of county government among the constituent municipalities. The real issues in this case relate to the determination of which rate produces the fairest result, consistent with the overriding goal of the Legislature, and, if the existing practice is not statutorily or constitutionally proper, whether the court was authorized to create the remedy it imposed.

For the reasons hereinafter expressed, we remand for further proceedingss.

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A.

In the case of the added and omitted assessments, there is discrimination in the sense that the components that make up the rate are not uniform among Hudson County municipalities. The crucial difference flows from the stipulation that added and omitted assessments are not used to fund the county vocational school. Here, it was stipulated that none of the added or omitted taxes are in fact used for the vocational school but are used for general county purposes. Thus, as plaintiff argues, it "and the ten (10) other municipalities in Hudson County are taxed for the added and omitted assessments at the higher of the dual rates, while Bayonne is taxed at the lower of the dual rates, yet none of the proceeds of taxation for added and omitted assessments at the higher rate is applied to the funding of the vocational school."

Particularly in light of the agreement of counsel that the added and omitted assessments are not used to fund the county school, there appears to be justification for the judge's conclusions that the present system is discriminatory and unlawful. However, we decline to decide the issue because the City of Bayonne as well as the Hudson County municipalities are entitled to be heard, and it should therefore be given the opportunity to address the threshold claim. We thus remand because Bayonne and the other municipalities, while given notice of the suit, were not joined as parties. Moreover, plaintiff raises constitutional issues on this appeal which should be addressed in the first instance by the trial judge.

R. 4:28-1(a) provides, in pertinent part, that a person shall be joined as a party "if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest in the subject of the action and is so situated that the disposition of

the action in his absence may . . . (i) as a practical matter impair or impede his ability to protect that interest." According to Judge Pressler, "indispensability is usually determined from the point of view of the absent party and in consideration of whether or not his rights and interests will be adversely affected." *Pressler, Current N.J. Court Rules,* Comment *R.* 4:28-1 (1988).

In the present case, both defendants alleged in their answers that all of the municipalities in Hudson County were indispensable parties to the action. Defendants pressed the point on the return of the order to show cause. The judge disagreed. However, his ruling directly affects all municipalities, and the parties in fact stipulated that if there was any reduction in the rate used for calculating added and omitted assessments, "one effect would be to increase the amount of County taxes to be apportioned amongst all Hudson County municipalities."

The other municipalities, especially Bayonne, were therefore indispensable parties in the sense that plaintiff's proposed solution, and at least to some degree, the remedy adopted by the trial judge, adversely affected Bayonne and its taxpayers. Furthermore, if plainitff is correct in its contention about the remedy imposed, the other municipalities were adversely affected. Moreover, there is an obvious practical advantage to joining Bayonne and the other municipalities as parties. One would expect that Bayonne in particular would strive to show precisely how any change in the existing scheme would affect its taxpayers. It would certainly be helpful to have more information about the impact of the judge's solution or plaintiff's proposed solution. With such information a court would be in a better position to construe the phrase "county rate" in a manner most consistent with the overriding goal of the legislation, namely to insure "that the fiscal burden of county government shall be apportioned equally and

impartially among the several municipalities." *Clifton v. Passaic County Bd. of Taxation, supra*, 28 *N.J.* at 418. The record discloses that even the judge was unsure about the practical impact of his decision, although he endeavored to apply that principle in developing the remedy he created.

B.

In its reply brief, plaintiff contends that the system employed by the county board is invalid and unconstitutional, because *N.J. Const.* (1947), Art. VIII, §I, par. 1(a), provides that "[p]roperty shall be assessed for taxation under general laws and by uniform rules." The subject was not raised in the complaint, nor before the trial court, and was not addressed in plaintiff's main brief filed with this court; and it is improper to raise new arguments in a reply brief before us. *Brown v. Shaw*, 174 *N.J. Super.* 32, 39 (App. Div. 1980). The new contentions relate to both the claim for relief and remedy, and should be addressed initially by the trial court.

As the matter must be remanded so that indispensable parties may be joined, the constitutional issues should be presented simultaneously, so that all interested parties may respond. On remand, the trial judge should liberally permit amendment of the pleadings to add the necessary parties, claims and defenses. The trial judge should initially decide the constitutional issues raised, unless he feels the matter can properly be resolved by statutory construction which avoids a constitutional claim.

While the court may adhere to its initial determination as to the impropriety of the present system, we emphasize that such a holding does not necessarily require entry of the relief sought by plaintiff or imposed by the court.

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It is argued before us that the court exceeded its authority by ordering the county to segregate a portionof the money received by way of added and omitted assessments for the use of the county vocational school. Plaintiff cites *Robinson v. Cahill,* 70 *N.J.* 155 (1976), for the proposition that a trial court does have the authority "to fashion an appropriate remedy for the violation of a statute." The relief ordered in *Robinson* was a last resort and followed prior decisions in the same case in which the Supreme Court had urged the legislature to take action to provide a remedy. See *Robinson v. Cahill,* 62 *N.J.* 473 (1973); 63 *N.J.* 196 (1973). *See also* 70 *N.J.* 155 (1976); 70 *N.J.* 464, 465 (1976). We do not address the propriety of the remedy fashioned here because of the need for further review of the matter by trial judge after hearing from all indispensible parties.[2]

In essence, we conclude that the existing scheme utilized by the board should not have been addressed until all of the municipalities in the county had been joined and it was clear how any change ordered would affect the respective tax burdens of the various municipalities. We therefore remand to permit the development of a complete record and consideration of the significant and important public issues in light of the factual determinations and appropriate law. We do not retain jurisdiction.

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2. We do not suggest that this remedy might not be appropriate after all parties have had an opportunity to be heard.